Supreme Court, U.S.
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No. 96-2016

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DONNA E. SHALALA, Secretary,
Department of Health and Human Services,
Petitioner,

v.

THE TOLEDO HOSPITAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE RESPONDENT

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STATEMENT OF THE ISSUE

Whether a provision (42 U.S.C. § 1395ww(h)(2)(A)) in 1986 legislation establishing a new Medicare payment methodology for graduate medical education ("GME") costs, which directs the Secretary of Health and Human Services ("the Secretary") to "determine," for a hospital's 1984 cost reporting year, "the average amount [of the hospital's GME costs] recognized as reasonable under this subchapter . . . for each full-time-equivalent resident," requires the Secretary to determine the average using the actual, final "amount recognized as reasonable under this subchapter" for 1984 or whether it authorizes the Secretary to determine the average by reauditing and redetermining the amount of GME costs for 1984 after the reopening and record retention periods for 1984 have expired.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-2046

DONNA E. SHALALA, Secretary,
Department of Health and Human Services,
Petitioner,

v.

THE TOLEDO HOSPITAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") 1a-21a) is reported at 104 F.3d 791. The opinion of the district court (App. 22a-41a) is unreported.

JURISDICTION

The court of appeals entered judgment on January 13, 1997. It denied petitioner's petition for rehearing on March 27, 1997. Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT

The issue in this case is the same as the issue in *St. Paul-Ramsey Medical Center, Inc. v. Shalala*, petition for cert. granted, No. 96-1375 (June 2, 1997). The statutory and regulatory background have been set forth in some detail in Brief for the Petitioner filed on July 25, 1997 in *St. Paul-Ramsey* at 2-11. To avoid duplication, respondent hereby incorporates by reference the detailed factual background in that brief. Respondent supplements that statement with the following summary and a brief discussion of the facts peculiar to this case.

This case presents a straightforward question of statutory construction. At issue is the meaning of a provision in 1986 legislation establishing a new Medicare payment method for graduate medical education ("GME") costs effective for hospital fiscal years beginning on or after July 1, 1985. For all previous years, Medicare had reimbursed teaching hospitals its share of the "reasonable costs" of GME. Under the new method, each year Medicare pays a teaching hospital a percentage, based on the ratio of Medicare patient days to total patient days, of a base year (1984) amount per intern and resident (updated for inflation) multiplied by the hospital's number of full-time-equivalent ("FTE") interns and residents ("residents") during the payment year.

With respect to the base year amount per resident, the statute directs the Secretary to "determine, for the hospital's cost reporting period that began during fiscal year 1984, the average amount recognized as reasonable under this subchapter for direct graduate medical education costs of the hospital for each full-time-equivalent resident." When the GME statute was enacted in 1986, the Medicare subchapter already contained a long-standing administrative process to establish the amount of GME costs recognized as reasonable for each year, including 1984. Thus, to determine the "average" base year amount per resident

under the new payment method, the Secretary had to count the number of FTE residents at the hospital during 1984 and divide the amount of GME costs recognized as reasonable for the hospital for 1984 by the number of the hospital's 1984 residents.

By April 1986, when the GME legislation was enacted, the Secretary had issued determinations, under the long-standing administrative process, of the amount of reasonable GME costs for 1984 for some hospitals but not for others. (These determinations are known as notices of program reimbursement ("NPRs").) In no case, however, was the determination of the amount of reasonable GME costs for 1984 yet final and binding under the Secretary's rules. All such determinations were still well within the three-year reopening period established under the Secretary's regulations and were subject to revision, if necessary, during that period.

The Secretary waited until September 29, 1989, three and a half years after the statute's enactment, to issue regulations. By that date, many of the determinations of the amount of reasonable GME costs for 1984 (including the determination issued to respondent) were final, binding, and no longer subject to reopening under the Secretary's own rules, and teaching hospitals were no longer even required to retain audit documentation for 1984 under those rules. Nonetheless, the Secretary issued a regulation (the "reaudit regulation") requiring *reaudits* of the 1984 GME costs recognized as reasonable for those teaching hospitals for purposes of determining their average base year amounts per resident. Thus, for purposes of the new GME payment methodology, the Secretary retroactively abrogated the reopening and record retention standards in her own regulations after expiration of the applicable limitations periods and placed hospitals in the position of having to reprove costs already proven with finality at a time when many no longer possessed the necessary audit documentation for 1984.

Respondent is a not-for-profit teaching hospital located in Toledo, Ohio. Respondent's GME base year is its cost reporting year ending December 31, 1984. After conducting a full audit, the Medicare intermediary (the Secretary's agent) issued the NPR for respondent's 1984 fiscal year on February 26, 1986.

Three years passed after issuance of respondent's NPR for 1984 without a reopening related to medical education costs. Accordingly, as of February 27, 1989 (three years and one day after issuance of the NPR), the intermediary's determination of the amount recognized as reasonable for 1984 was "final and binding" and no longer subject to reopening. 42 C.F.R. §§ 405.1807, 405.1885(a). Moreover, as of January 1, 1989 (four years and one day after the close of its GME base year), respondent was no longer required to retain the physician allocation documentation supporting the GME costs recognized as reasonable in the NPR for 1984. *See* 42 C.F.R. § 405.481(g)(1), (3) (1995).

The Medicare intermediary nonetheless began reauditing respondent's 1984 year in late 1990 for purposes of the GME amount per resident methodology. On January 31, 1991, the intermediary issued a notice of average amount per resident for respondent's 1984 year. The intermediary computed the amount per resident in that notice by using as the numerator a "reaudited" amount of 1984 GME costs which was lower than the amount recognized as reasonable in the NPR for 1984.

After exhausting administrative remedies, respondent filed suit in the U.S. District Court for the Northern District of Ohio, challenging the validity of the reaudit regulation. On June 23, 1995, the district court upheld the validity of the reaudit regulation (App. 22a-41a). On January 13, 1997, the U.S. Court of Appeals for the Sixth Circuit reversed (App. 1a-21a). The court invalidated the reaudit regulation under both steps of the test formulated

by this Court for assessing the validity of agency constructions in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court held that the reaudit regulation conflicts with the plain words of the GME legislation and is also unreasonable because it violates principles of issue preclusion and fundamental fairness.

ARGUMENT

For the reasons stated by the court of appeals and by the petitioner in Brief for the Petitioner filed in *St. Paul-Ramsey*, respondent contends that the decision of the court of appeals is clearly correct. However, given the pendency of *St. Paul-Ramsey* before this Court, respondent agrees with petitioner that the Court should defer decision on the petition for certiorari until it has decided *St. Paul-Ramsey*.

CONCLUSION

For the foregoing reasons, the Court should defer ruling on the petition for certiorari until it has decided *St. Paul-Ramsey*.

Respectfully submitted,

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